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February 5, 1996

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

William F. Caton
Acting Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, D.C. 20554

Re: Ex Parte Presentation -- CC Docket No. 93-22

Dear Mr. Caton:

On Monday, February 5, 1996, the undersigned made an ex parte presentation to Lauren J. Belvin, Senior Legal Advisor to Commissioner James H. Quello, on behalf of GE Information Services ("GEIS"). The views expressed on behalf of GEIS are reflected in the enclosed materials.

Please let us know if you have any questions.

Sincerely,


Joseph P. Markoski

/jef
Enclosures

cc: Lauren J. Belvin (w/out encl.)

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GE Information Services, Inc.
401 N. Washington Street, Rockville, MD 20850

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**EX PARTE PRESENTATION -- POLICIES AND RULES
IMPLEMENTING THE TELEPHONE DISCLOSURE AND DISPUTE
RESOLUTION ACT, CC DOCKET NO. 93-22**

**I. LEGITIMATE INFORMATION SERVICE PROVIDERS HAVE TRADITIONALLY
ESTABLISHED BUSINESS RELATIONSHIPS WITH CUSTOMERS THROUGH
WRITTEN CONTRACTS OR THE USE OF GENERAL PURPOSE CREDIT CARDS.**

- High-volume customers generally obtain information services pursuant to written contracts that are the product of face-to-face discussions with individual sales representatives.
- Home enthusiasts and small businesses generally subscribe to information services either through the mails, using preprinted order forms, or while on-line, using general purpose credit cards.

**II. THE GROWING AWARENESS AND USE OF INFORMATION SERVICES HAVE
CREATED ADDITIONAL OPPORTUNITIES TO MARKET SERVICES TO, AND
ENTER SUBSCRIPTION AGREEMENTS WITH, NEW CUSTOMERS ON AN ON-
LINE BASIS.**

- Information service providers advertise their services in printed media, as well as in cyberspace. These advertisements invite potential customers to contact information service providers -- free of charge through an 800 Service number -- to obtain further information about their services and subscribe.
- Computer-literate customers, using their PCs or computer systems, are responding to these advertisements in increasing numbers.
- Whether prompted by advertising or exigent business circumstances, many customers are interested in subscribing and obtaining immediate on-line access to the information services about which they call.
- Many of these new customers are small-to-medium-sized businesses that require monthly invoices from their vendors.
- The use of 800 Service by these customers in contacting information service providers implicates the provisions of Section 228(c)(7) of the Act.

III. IF THE COMMISSION DETERMINES THAT "WRITTEN" PRESUBSCRIPTION OR COMPARABLE ARRANGEMENTS ARE NECESSARY TO PROTECT CONSUMERS, IT SHOULD PERMIT THE USE OF AGREEMENTS THAT ARE ELECTRONICALLY TRANSMITTED AND EXECUTED.

- Electronic commerce -- i.e., freeing business from its dependence on paper and the physical handling and transmission of documents -- is at the heart of the Information Age and a prototypical use of the National Information Infrastructure.
- The use of on-line agreements will provide subscribers with immediate access to the information services they want and need. Requiring the use of agreements that are recorded on paper and sent through the mails will needlessly frustrate the efficient marketing of information services and delay their availability to consumers.
- The legitimacy of on-line agreements and their value in protecting consumers have been recognized by the amendments to Section 228(c) of the Communications Act made by the "Telecommunications Act of 1996."
- Any risk of loss presented by the use of on-line agreements lies with information service providers that offer service to subscribers pursuant to these agreements. If these agreements are unenforceable, information service providers may have difficulty collecting for their services; if these contracts are enforceable, subscribers will be protected by their terms.
- Consumers will be able to protect themselves by printing or downloading a copy of their subscription agreements and retaining them for their records.
- The use of on-line agreements will not materially increase the likelihood that presubscription or comparable arrangements are executed by individuals who are not legally competent. To the extent that the use of on-line agreements does enhance that possibility, information service providers -- and not consumers -- will be at risk.
- In short, the use of on-line agreements is totally consistent with the Telecommunications Act of 1996, the Telephone Disclosure and Dispute Resolution Act, and the Commission's goals in this proceeding.
- Therefore, if Section 64.1501(b) is to be amended, the rule should expressly permit the use of on-line agreements.

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104TH CONGRESS }
2d Session }

HOUSE OF REPRESENTATIVES

REPORT
104-458

TELECOMMUNICATIONS ACT OF 1996

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

JANUARY 31, 1996. Ordered to be printed

Mr. BLILEY, from the committee of conference,
submitted the following

CONFERENCE REPORT

[To accompany S. 652]

The committee of conference on the disagreeing votes of the two Houses on the amendments of the House to the bill (S. 652), to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition, and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the Senate recede from its disagreement to the amendment of the House to the text of the bill and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the House amendment, insert the following:

SECTION 1. SHORT TITLE; REFERENCES.

(a) **SHORT TITLE.**—*This Act may be cited as the "Telecommunications Act of 1996".*

(b) **REFERENCES.**—*Except as otherwise expressly provided, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of the Communications Act of 1934 (47 U.S.C. 151 et seq.).*

SEC. 2. TABLE OF CONTENTS.

The table of contents for this Act is as follows:

Sec. 1. Short title; references.

Sec. 2. Table of contents.

Sec. 3. Definitions.

receiving revenue derived from a tax or fee imposed and collected by a State.

TITLE VII—MISCELLANEOUS PROVISIONS

SEC. 701. PREVENTION OF UNFAIR BILLING PRACTICES FOR INFORMATION OR SERVICES PROVIDED OVER TOLL-FREE TELEPHONE CALLS.

(a) PREVENTION OF UNFAIR BILLING PRACTICES.—

(1) IN GENERAL.—Section 228(c) (47 U.S.C. 228(c)) is amended—

(A) by striking out subparagraph (C) of paragraph (7) and inserting in lieu thereof the following:

“(C) the calling party being charged for information conveyed during the call unless—

“(i) the calling party has a written agreement (including an agreement transmitted through electronic medium) that meets the requirements of paragraph (8);
or

“(ii) the calling party is charged for the information in accordance with paragraph (9); or”;

(B)(i) by striking “or” at the end of subparagraph (C) of such paragraph;

(ii) by striking the period at the end of subparagraph (D) of such paragraph and inserting a semicolon and “or”;
and

(iii) by adding at the end thereof the following:

“(E) the calling party being assessed, by virtue of being asked to connect or otherwise transfer to a pay-per-call service, a charge for the call.”; and

(C) by adding at the end the following new paragraphs:

“(8) SUBSCRIPTION AGREEMENTS FOR BILLING FOR INFORMATION PROVIDED VIA TOLL-FREE CALLS.—

“(A) IN GENERAL.—For purposes of paragraph (7)(C)(i), a written subscription does not meet the requirements of this paragraph unless the agreement specifies the material terms and conditions under which the information is offered and includes—

“(i) the rate at which charges are assessed for the information;

“(ii) the information provider’s name;

“(iii) the information provider’s business address;

“(iv) the information provider’s regular business telephone number;

“(v) the information provider’s agreement to notify the subscriber at least one billing cycle in advance of all future changes in the rates charged for the information; and

“(vi) the subscriber’s choice of payment method, which may be by direct remit, debit, prepaid account, phone bill, or credit or calling card.

"(B) BILLING ARRANGEMENTS.—If a subscriber elects, pursuant to subparagraph (A)(vi), to pay by means of a phone bill—

"(i) the agreement shall clearly explain that the subscriber will be assessed for calls made to the information service from the subscriber's phone line;

"(ii) the phone bill shall include, in prominent type, the following disclaimer:

Common carriers may not disconnect local or long distance telephone service for failure to pay disputed charges for information services.'; and

"(iii) the phone bill shall clearly list the 800 number dialed.

"(C) USE OF PINS TO PREVENT UNAUTHORIZED USE.—A written agreement does not meet the requirements of this paragraph unless it—

"(i) includes a unique personal identification number or other subscriber-specific identifier and requires a subscriber to use this number or identifier to obtain access to the information provided and includes instructions on its use; and

"(ii) assures that any charges for services accessed by use of the subscriber's personal identification number or subscriber-specific identifier be assessed to subscriber's source of payment elected pursuant to subparagraph (A)(vi).

"(D) EXCEPTIONS.—Notwithstanding paragraph (7)(C), a written agreement that meets the requirements of this paragraph is not required—

"(i) for calls utilizing telecommunications devices for the deaf;

"(ii) for directory services provided by a common carrier or its affiliate or by a local exchange carrier or its affiliate; or

"(iii) for any purchase of goods or of services that are not information services.

"(E) TERMINATION OF SERVICE.—On receipt by a common carrier of a complaint by any person that an information provider is in violation of the provisions of this section, a carrier shall—

"(i) promptly investigate the complaint; and

"(ii) if the carrier reasonably determines that the complaint is valid, it may terminate the provision of service to an information provider unless the provider supplies evidence of a written agreement that meets the requirements of this section.

"(F) TREATMENT OF REMEDIES.—The remedies provided in this paragraph are in addition to any other remedies that are available under title V of this Act.

"(9) CHARGES BY CREDIT, PREPAID, DEBIT, CHARGE, OR CALLING CARD IN ABSENCE OF AGREEMENT.—For purposes of paragraph (7)(C)(ii), a calling party is not charged in accordance with this paragraph unless the calling party is charged by means of a credit, prepaid, debit, charge, or calling card and

the information service provider includes in response to each call an introductory disclosure message that—

“(A) clearly states that there is a charge for the call;

“(B) clearly states the service’s total cost per minute and any other fees for the service or for any service to which the caller may be transferred;

“(C) explains that the charges must be billed on either a credit, prepaid, debit, charge, or calling card;

“(D) asks the caller for the card number;

“(E) clearly states that charges for the call begin at the end of the introductory message; and

“(F) clearly states that the caller can hang up at or before the end of the introductory message without incurring any charge whatsoever.

“(10) **BYPASS OF INTRODUCTORY DISCLOSURE MESSAGE.**—

The requirements of paragraph (9) shall not apply to calls from repeat callers using a bypass mechanism to avoid listening to the introductory message, provided that information providers shall disable such a bypass mechanism after the institution of any price increase and for a period of time determined to be sufficient by the Federal Trade Commission to give callers adequate and sufficient notice of a price increase.

“(11) **DEFINITION OF CALLING CARD.**—As used in this subsection, the term ‘calling card’ means an identifying number or code unique to the individual, that is issued to the individual by a common carrier and enables the individual to be charged by means of a phone bill for charges incurred independent of where the call originates.”

(2) **REGULATIONS.**—The Federal Communications Commission shall revise its regulations to comply with the amendment made by paragraph (1) not later than 180 days after the date of enactment of this Act.

(3) **EFFECTIVE DATE.**—The amendments made by paragraph (1) shall take effect on the date of enactment of this Act.

(b) **CLARIFICATION OF “PAY-PER-CALL SERVICES”.**—

(1) **TELEPHONE DISCLOSURE AND DISPUTE RESOLUTION ACT.**—Section 204(1) of the Telephone Disclosure and Dispute Resolution Act (15 U.S.C. 5714(1)) is amended to read as follows:

“(1) The term ‘pay-per-call services’ has the meaning provided in section 228(i) of the Communications Act of 1934, except that the Commission by rule may, notwithstanding subparagraphs (B) and (C) of section 228(i)(1) of such Act, extend such definition to other similar services providing audio information or audio entertainment if the Commission determines that such services are susceptible to the unfair and deceptive practices that are prohibited by the rules prescribed pursuant to section 201(a).”

(2) **COMMUNICATIONS ACT.**—Section 228(i)(2) (47 U.S.C. 228(i)(2)) is amended by striking “or any service the charge for which is tarified,”

SEC. 702. PRIVACY OF CUSTOMER INFORMATION.

Title II is amended by inserting after section 221 (47 U.S.C. 221) the following new section:

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September 1, 1995

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Kathleen M.H. Wallman
Chief, Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W., Room 500
Washington, D.C. 20554

Re: CC Docket No. 93-22 -- Use of On-Line Agreements

Dear Ms. Wallman:

During our meeting of August 18, 1995, we discussed the adverse impact which the Commission's proposals in CC Docket No. 93-22 could have on the use of on-line, electronically transmitted agreements by legitimate information service providers ("ISPs"). At the conclusion of that meeting, you asked GE Information Services ("GEIS") to give some thought to the ways in which the Commission could achieve its goal of curtailing abusive practices on the part of unscrupulous ISPs, without erecting unwarranted obstacles to the use of on-line agreements by legitimate ISPs. GEIS has now had an opportunity to do so.

In considering the problem confronting the Commission, GEIS began by focusing on the differences between a rule that requires the use of "paper" contracts and one that permits the use of on-line contracts. GEIS has concluded that, while a rule requiring the use of "paper" contracts would have a serious adverse economic impact on legitimate ISPs, it would not provide consumers with substantially more protection against the practices of unscrupulous ISPs than a carefully crafted rule permitting the use of on-line agreements. In this regard, a rule allowing the use of on-line agreements would not appear to be much different than the Commission's existing rules, which permit the use of general purpose credit cards to obtain on-line access to information services.

At first blush, a rule requiring the use of "paper" contracts would appear to create a break (or "cooling off period") between the execution of a contract and the start of service. The delay, however, could be minimal if an unscrupulous ISP were to place order forms (i.e.,

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"paper" contracts) in periodicals or on bulletin boards and encourage the filing of these orders by fax. (Some manufacturers of fax machines already use this technique to register warranties, check the performance of newly purchased devices, and establish service contracts.) Alternatively, and far easier, an unscrupulous ISP could begin providing service based on a caller's representation that a signed order form or contract is in the mail.

Similarly, a rule requiring "paper" contracts would appear to provide consumers with protection against unscrupulous ISPs by creating a physical (*i.e.*, paper) record of their agreement. Such a physical record would exist, however, only if a consumer were to make, and then keep, a copy of its completed order form or contract. A rule requiring "paper" contracts would also appear to ensure that only legally competent individuals order information services. "Paper" contracts, however, will rarely -- if ever -- be delivered in person. Rather, they will be sent through the mails, by fax, or through some other means. As a consequence, a minor could easily represent himself/herself as an adult or use his/her parent's name and forge their signature. An unscrupulous ISP would not be concerned about the legal competence of the individual signing a contract and ordering service.

Notwithstanding the relatively modest differences between "paper" and on-line contracts, GEIS has concluded that there are ways in which the Commission can provide consumers with additional protection against unscrupulous ISPs without unduly restricting the use of on-line agreements.

First, the Commission can prohibit carriers from performing billing and collection for information services provided pursuant to on-line contracts. Although such a requirement would not present a problem for most legitimate ISPs, it would make billing and -- more important -- collection difficult for unscrupulous ISPs.

Second, the Commission can require ISPs that make use of on-line contracts to offer their subscribers the ability to print or download a copy of their on-line contract at no charge to the consumer. Such a requirement would provide consumers with a tangible record of their executed service agreement.

Third, the Commission can prohibit ISPs that make use of on-line agreements from providing any information service to a customer during the call in which the customer first executes the on-line agreement. Although such a prohibition exalts form over substance, it will reduce the potential for confusion about whether the consumer will incur any charges during the first "toll

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free" call. Moreover, by requiring the consumer to hang up and place a second call (and, in the case of legitimate ISPs, more likely than not to a different number), such a requirement will provide the consumer with an opportunity to reflect -- however briefly -- on whether to make a second call and incur charges.

In addition to the three safeguards outlined above, GEIS considered a number of other alternatives that were based on the type of information service being provided and the identity of the customer being served. None of these alternatives, however, would likely be effective in halting the abusive practices of unscrupulous ISPs. GEIS, for example, considered proposing a rule that would limit the use of on-line contracts to business information services. An unscrupulous ISP could easily avoid such a limitation by packaging a legitimate, but never intended to be used, business service with the service actually desired by the consumer. Similarly, a non-business service (e.g., pornography) could be euphemistically labelled as a business service (e.g., a "graphic information management service"). Such a rule would also fail to take into account the fact that there are many services that could arguably find uses by both business and residential consumers.

GEIS also considered a rule that would limit the use of on-line contracts to business customers. This, too, would likely be unenforceable. An unscrupulous ISP could easily persuade callers to name their employer or their parents' employer as part of the application process. An unscrupulous ISP could also characterize a caller (or encourage a caller to characterize himself/herself) as a sole proprietor of a small business.

In addition to concerns about unscrupulous ISPs, your staff raised a question about the Commission's ability to adopt a rule in this proceeding that approves the use of on-line contracts, consistent with the requirements of the Administrative Procedure Act ("APA"). The question appears to be predicated on concerns about both notice and the record. Insofar as notice is concerned, the courts have consistently concluded that the Commission will be deemed to have complied with the requirements of the APA "so long as the content of the agency's final rule is a 'logical outgrowth' of its rulemaking proposal. . . . The focus of the 'logical outgrowth' test, we have added, 'is whether . . . [the party], ex ante, should have anticipated that such a requirement might be imposed.'" Aeronautical Radio, Inc. v. FCC, 928 F.2d 428, 445-46 (D.C. Cir. 1991).

In this proceeding, the Commission's Notice of Proposed Rulemaking ("Notice") expressly raised the question whether the Commission should revise Section 64.1501 of its rules so as to mandate "a contractual agreement, executed in writing." As you know, "writing" is a term of art in contract law. If "writing" includes, as GEIS believes it does, on-line contracts, the Commission plainly has given adequate notice of a rule allowing the use of such agreements. (The law review article which we provided you and which we have filed in the record of this

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proceeding suggests that the courts would concur in such a conclusion.) If "writing" is limited to "paper" contracts and the Commission decides to accept something less than "paper" contracts, i.e., on-line contracts, the Commission also has given adequate notice, since its new rules would reflect a lesser included alternative than that originally proposed by the Notice.

As concerns the adequacy of the record, GEIS submits that the adoption of a rule that includes on-line contracts within the term "writing" reflects a legal, rather than factual or policy, judgment. Moreover, the materials which GEIS has filed in the record of this proceeding documenting its ex parte presentations to you and your staff provide more than adequate support for the adoption of a rule allowing the use of on-line agreements. Clearly, the Commission is entitled to -- and, in the past, has concluded that it may -- act on the basis of such ex parte presentations in a rulemaking proceeding where, as here, those presentations are formally part of the record. See, e.g., Authorizing Private Carrier Systems in the Private Operational-Fixed Microwave Radio Service, PR Docket No. 83-426, FCC 85-53, 50 Fed. Reg. 13338 (¶ 67) (Apr. 4, 1985) (decision to preempt states predicated solely on two ex parte statements).

We hope the foregoing is responsive to your inquiries. GEIS would be pleased to meet with you or your staff to discuss its proposals at greater length. In the interim, please let us know if you have any questions or if we can provide you with any additional information.

Sincerely,



Joseph P. Markoski

/jef

cc: William F. Caton
John B. Muleta
Mary Beth Richards
Mary Romano
Warner Sinback